FILED
MAY 5 1978

BRIEF OF RESPONDENTS

SCHENLEY INDUSTRIES, INC.,
SCHENLEY DISTILLERS, INC., AND

SCHENLEY AFFILIATED BRANDS CORP. ON PETITION FOR CERTIORARI

#### UNITED STATES SUPREME COURT

NO. 77-1454

Ralph S. Abernathy, Administrator of the Estate of Eural Frank Abernathy, PLAINTIFF-PETITIONER

VS.

Schenley Industries, Inc., Schenley Distillers, Inc., Schenley Affiliated Brands Corp., and Mecklenburg Board of Alcoholic Beverage Control, DEFENDANTS-RESPONDENTS

Hunter M. Jones and Harry C. Hewson 1000 Law Building Charlotte, North Carolina 28202 Telephone: 704/333-8684 Counsel of Record for Respondents Schenley Industries, Inc., Schenley Distillers, Inc., and Schenley Affiliated Brands Corp.

Of Counsel: Jones, Hewson & Woolard

# SUBJECT INDEX

												Page
Table	Cou	cirt	ase Ri	es,	8 .	Sta	tu:	te:	s,	ar	d.	ii
Repor	ts Bel											1
Statu	Inv			-								1
Quest	ion											4
State	emen	it (	of	tł	ne	Ca	se					4
Argum	ent	:.										10
Concl	usi	on	.\									16
Appen	ndix	١.										A-1
	28	U.	S	. (	Cod	le,	5	2	101	۱.		A-1
	Ru1	e pp										A-3
	Ru1											A-4
	Exc											A-6

	TABLE OF CASES, STATUTES AND COURT RULES
	Cases
r	Abernathy v. Schenley Industries, Inc., et al., 240 F. Supp. 1 1, 6
	Abernathy v. Schenley Industries, Inc., et al., 556 F. 2d 242 1, 6
	Allen v. Trust Company, 35 N. C. App. 267, 241 S. E. 2d 123 (1978) 10
	Ballantine Books, Inc. v. Capital Distributing Company, 302 F. 2d 17 (C. A. 2, 1962)
t	Food Stores v. Board of Alcoholic Control, 268 N. C. 624, 151 S. E. 2d 582 (1966)
	Kline v. Burke Construction Company, 260 U. S. 226, 67 L. Ed. 226 (1922) 10
-	Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 983 (1877)
	ii

		Page
	United Mine Workers v. Gibbs, 383 U. S. 715, 726 (1966)	.7, 10
	Statutes	
•	North Carolina General Statutes Sections 1-46 and 1-53 Chapter 18A, Sections 18A-1, 10, 15(14), and	. 2
	17-(1), (2), and (7)	.3-4, A-6 to A-8
Ī	United States Code, Chapter 28, Section 2101(a), (b), and (c)	.1, 7, A-1 to A-2
	Court Rules	
İ	North Carolina Rules of Civil Procedure, Rule 41(b)	.3, A-4 to A-5
I	Federal Rules of Appellate Procedure, Rule 40(a)	.1, 14, A-3
I	U. S. Supreme Court Rules Rule 19(1)	.4
-	iii	

### REPORTS OF OPINIONS IN COURTS BELOW

Opinions and orders of the District Court dated July 31, 1967, and September 27, 1976, are reported in 420 F. Supp.

1. The opinion of the Court of Appeals for the Fourth Circuit is reported in 556 F. 2d 242.

# STATUTES AND COURT RULES INVOLVED

In addition to the statutes and rules referred to in the Petition, the following are considered pertinent to the case:

- 1. 28 U. S. Code, § 2101, paragraphs (a), (b), and (c), set out in the Appendix. (A-1 to A-2)
- 2. Rule 40(a) of the Federal Rules of Appellate Procedure set out in the Appendix. (A-3)
- 3. From The Michie Company's 1969 Replacement Volume 1A, General Statutes

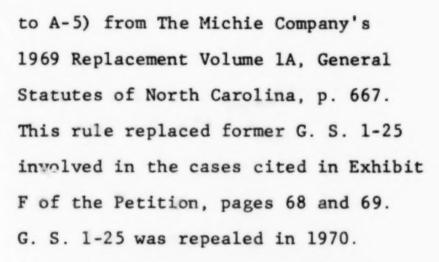
of North Carolina, Section 1-46 at page 71 and a part of Section 1-53 at pages 111-112 of said Volume 1A as follows:

"§ 1-46. Periods prescribed.-The periods prescribed for the commencement of actions, other than for the
recovery of real property, are as set
forth in this article. (C. C. P., s.
30; Code, s.151; Rev., s.390; C. S.;
s.436.)

"§ 1-53. Two years. -- Within two years--

"(4) Actions for damages on account of the death of a person caused by a wrongful act, neglect or default of another, under § 28-173 of the General Statutes of North Carolina. (1874-5, c. 243; 1876-7, c. 91, s.3; Code; ss.756, 3836; 1895, c. 69; Rev., s.396; C. S., s.442; 1931, c. 231; 1937, c. 359; 1945, c. 774; 1951, c. 246, s.2.)"

4. Rule 41(b) of the North Carolina
Rules of Civil Procedure, Appendix (A-4



pages of The Michie Company's 1975
Replacement Volume 1C, General Statutes of North Carolina, consisting of parts of Chapter 18A in effect prior to
December 29, 1973, and still in effect, to wit: Parts of Section 18A-1 (p. 318); all of Section 18A-10 (p. 328); parts of Section 18A-15 (pp. 330 and 333); and parts of Section 18A-17 (p. 335). (Appendix A-6 to A-8)

## QUESTIONS PRESENTED FOR REVIEW

Respondents accept Petitioner's statement of questions raised; but suggest that they are not questions appropriate for review under Supreme Court Rule 19(1).

### STATEMENT OF THE CASE

On December 23, 1975, plaintiff
filed this action for wrongful death
alleging that his intestate died during
the night of December 29, 1973, as a
result of consumption of alcoholic
beverages distributed by the Schenley
defendants and sold to him by the
Mecklenburg County Board of Alcoholic

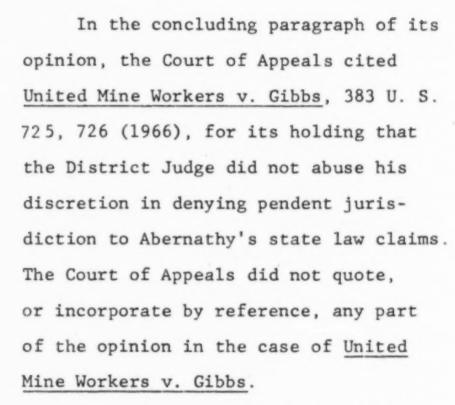
Beverage Control.

The complaint undertook to allege federal and state claims resulting from failure of the defendants to have on their bottles a warning that excessive use would cause death from acute ethanol poisoning; and to allege that death did, in fact, result from that source. The Medical Examiner's report contained at pages 65 to 69 of the Appendix to the briefs in the Court of Appeals on page 69 gives acute ethanol poisoning as the primary cause of death and second-degree burns from hot water and fatty liver as contributory causes. Deceased was found dead in a bathtub partially filled with water. In addition to indicating that a contributory cause of death was burns from hot water, the Medical Examiner's

report at page 69 of the Appendix to the briefs in the Court of Appeals indicates that deceased had a history of alcoholism.

The defendants moved for summary judgment in the District Court. This motion was first denied by the District Judge on July 31, 1976. On motion to reconsider, the District Court dismissed the federal claims on the merits and declined to exercise pendent jurisdiction as to the state claims by order dated September 27, 1976. Abernathy v. Schenley Industries, Inc., et al., 420 F. Supp. 1.

On appeal, the Court of Appeals for the Fourth Circuit affirmed and wrote a per curiam opinion. Abernathy v. Schenley Industries, Inc., et al., 556 F. 2d 242.



No petition to rehear was filed under Rule 40 of the Federal Rules of Appellate Procedure. No petition for certiorari to review the decision of the Court of Appeals reported at 556 F. 2d 242 was filed within the time provided by Title 28 U.S.C.A. § 2101, and no extension of time was applied for.

Petitioner, on September 23, 1977, filed an action in the Superior Court
Division of the North Carolina General
Court of Justice, against the Schenley
defendants alone, alleging substantially
the state law claims originally asserted
in this action. On motion for summary
judgment that action was dismissed on
February 21, 1978 (pages 64-65 of the
petition), on the ground that the action
is barred by the North Carolina statute
of limitations.

Petitioner gave notice of appeal in the state court action and thereafter on February 28, 1978, served, in the Court of Appeals in this action, the motion contained at pages 66 to 73 of the petition herein. In that motion Petitioner concedes that the

state court appeal is an exercise in futility. State Rule 41(b) (A-4 to A-5) does not sanction a court order extending the statute of limitations in case of dismissal on jurisdictional grounds. Also, as conceded in Petitioner's motion in the Court of Appeals (Petition, p. 69), the North Carolina courts have held former G. S. 1-25 not applicable to dismissals of actions instituted in federal courts. Petitioner's motion in the Court of Appeals was denied (see Petition, pages 74 and 75), and Petitioner served his Petition for Certiorari on March 30, 1978.

The affidavit of Petitioner's attorney attached to the Petition as Exhibit A (pages 25-27), was not before the courts below and seems inappropriate for consideration or discussion on the

present Petition.

## ARGUMENT

Petitioner's assertion that the Court of Appeals set a trap for, and misled, him, is a blatant attempt to blame the Court for Petitioner's own neglect to protect whatever rights he had. To follow Petitioner's argument to its logical conclusion would mean that any plaintiff could control the Court's discretion discussed in United Mine Workers v. Gibbs, 383 U. S. 715, 726, by allowing his state law claims to be barred while prosecuting a federal court action. Then the federal court, according to Petitioner's argument, would have no choice but to exercise its pendent jurisdiction.

Petitioner could have brought another action in the state court within the statutory period and the pendency thereof would not bar the prosecution of his federal court action. Nor would the pendency of the federal court action have barred the state court action. Both could have been prosecuted concurrently until an adjudication on the merits in one of them.

Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 983 (1877).

Kline v. Burke Construction Company, 260 U. S. 226, 67 L. Ed. 226 (1922).

Ballantine Books, Inc. v. Capital Distributing Company, 302 F. 2d 17 (C. A. 2, 1962).

Allen v. Trust Company, 35 N. C. App. 267, 241 S. E. 2d 123 (1978).

In the case last cited, the report shows that the plaintiff brought a second action in the state court "to protect plaintiff from the runing of the statute of limitations in the event the federal action should be dismissed for lack of jurisdiction." The Court stayed the action in state court until the federal action could be disposed of.

Petitioner knew, but the Court did not, that Petitioner had no action pending in the state court.

Petitioner's attorney undoubtedly knew that the state statute of limitations in wrongful death actions was two years.

Petitioner's attorney knew, or should have known, while the Court had no obligation to know in this

particular case, that, under North Carolina law, the pendency of the federal court action did not suspend the running of the statute.

If the predicament in which

Petitioner has placed himself would

have made any difference in the

exercise of the discretion of the

District Court or the decision of

the Court of Appeals as to abuse of

discretion, the fault in not having

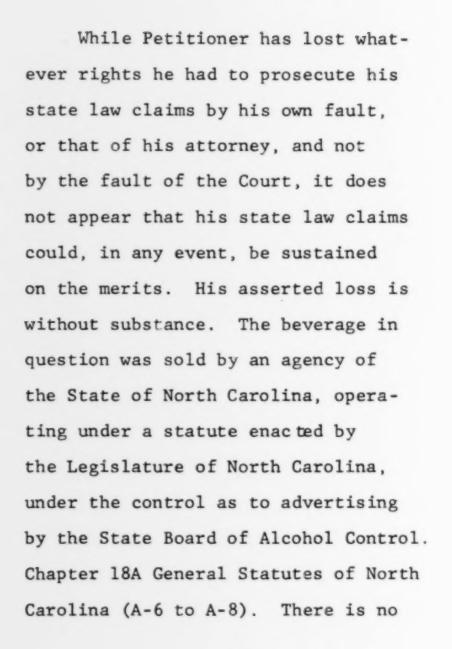
that feature in perspective was that

of Petitioner and not of the courts.

It was the function of Petitioner's counsel to present in the
District Court and in the Court of
Appeals all reasons why pendent
jurisdiction should be accepted. He
could have petitioned for a rehearing

within the time period provided by
Rule 40(a) of the Federal Rules of
Appellate Procedure (A-3). At any
of these stages, he could have advised the Court that Petitioner had
already lost any right to sue in the
state court. In the absence of the
proper exercise of his function, the
courts had no duty to determine
whether or not Petitioner's action
in the state court was barred.

It is not thought that timely argument of Petitioner's present position would, or should, have produced a different result. These functions of Petitioner and his counsel, as distinguished from the functions of the Court, are pointed out in answer to Petitioner's unwarranted attack on the integrity of the Court of Appeals.



Board had any regulation requiring warning labels on the bottles or in the advertising of the product of the defendants. This specific legislation would control over the general warranty statute relied on by Petitioner (even if that statute was otherwise applicable which is denied).

Food Stores v. Board of Alcoholic Control, 268 N. C. 624, 151 S. E. 2d 582 (1966).

### CONCLUSION

For the reasons hereinbefore stated, the respondents Schenley Industries, Inc., Schenley Distillers, Inc., and Schenley Affiliated Brands Corp., pray

that the Petition for Certiorari be denied.

Respectfully submitted,

Hunter M. Jones 1000 Law Building Charlotte, North Carolina 28202

Harry C. Hewson 1000 Law Building Charlotte, North Carolina 28202

Counsel of Record for Respondents Schenley Industries, Inc., Schenley Distillers, Inc., and Schenley Affiliated Brands Corp.

## Of Counsel:

Jones, Hewson & Woolard 1000 Law Building Charlotte, North Carolina 28202

#### APPENDIX

28 U. S. Code § 2101

"§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

- "(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.
- "(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.
- "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown,

may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Rule 40(a) of the Federal Rules of Appellate Procedure

"Rule 40.

# "PETITION FOR REHEARING

"(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case."

Rule 41(b) of the North Carolina Rules of Civil Procedure

"Rule 41

# "DISMISSAL OF ACTIONS

\* \* \*"(b) Involuntary Dismissal; Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits. If the court specifies that the dismissal of an action

commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal. (Amended 1969)"

Excerpts from Chapter 18A of the General Statutes of North Carolina

"§ 18A-1. Purpose of Chapter.--The purpose and intent of this Chapter is to establish a uniform system of control over the sale, purchase, transportation, manufacture, and possession of intoxicating liquors in North Carolina, and to provide administrative procedure to insure, as far as possible, the proper administration of this Chapter under a uniform system throughout the State. This Chapter shall be liberally construed to the end that the sale, purchase, transportation, manufacture, and possession of intoxicating liquors shall be prohibited except as authorized in this Chapter. (1937, c. 49, s. 1; 1971, c. 872, s. 1.)"

\* \* \*

"§ 18A-10. Advertisements.--It shall be lawful to advertise anywhere or by any means or method liquor or the manufacture, sale, keeping for sale, or furnishing of the means by which it may be obtained, or where, how, from whom, or at what price it may be obtained, provided such advertising complies with the rules and regulations of the State Board of Alcoholic Control. (1923, c. 1, s. 3; C. S., s. 3411(c); 1933, cc. 216, 229; 1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1957, c. 1048; 1963, c. 426, s. 10; c. 460, s. 1; 1971, c. 872, s.1.)"

"§ 18A-15. Powers and authority of State Board.--The State Board of Alcoholic Control shall have power and authority as follows:

\* \* \*

"(14) To adopt, amend, or repeal reasonable rules and regulations for the purpose of carrying out the provisions of this Chapter, but not inconsistent herewith, which rules and regulations shall become effective when filed as provided by law."

\* \* \*

"§ 18A-17. Powers and duties of county boards.--The said county boards shall each have the following powers and duties:

- "(1) Control and jurisdiction over the importation, sale and distribution of alcoholic beverages within its respective county;
- "(2) Power to buy and to have in its possession and to sell alcoholic beverages within its county;

"(7) To import, transport, receive, purchase, sell, and deliver and have in its possession for sale for present and future delivery alcoholic beverages;